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IN THE

Supreme Court of the United States

October Term, 1968

No. 50

HANOVER INSURANCE COMPANY OF NEW YORK,

Appellant,

v.

CARL S. VICTOR,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL BRIEF OF APPELLANT IN SUPPORT OF JURISDICTION

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1273

HANOVER INSURANCE COMPANY OF NEW YORK,

Appellant,

v.

CARL S. VICTOR,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL BRIEF OF APPELLANT IN SUPPORT OF JURISDICTION

This brief is filed pursuant to Rule 16(5) to advise the Court of a new, unpublished memorandum-decision of the New York Court of Appeals in the case of *Simpson* v. *Loehmann*, 21 N.Y.2d 305 (1967) [Jurisdictional Statement, Appendix "A"].

Following the original decision the Appellant in *Simpson* moved for reargument in the New York Court of Appeals. This motion for reargument was denied in a memorandum-decision, a copy of which is set forth in Appendix "D".

In this memorandum-decision the Court of Appeals held for the first time that, even though the defendant insured appears, defends on the merits and loses, ". . . there may not be any recovery against the defendant in this sort of

case in an amount greater than the face value of such insurance policy even though he proceeds with the defense on the merits." This is an apparent exemption carved out of CPLR §320 in direct contradiction to the express legislative purpose of requiring defendants whose property is attached, if they wish to defend on the merits, to appear generally and litigate the entire dispute without limit as to liability. The attempt fails to remedy the basic faults of this attachment procedure.

The ostensible relief afforded by the memorandum-decision is illusory. If the defendant appears, answers and litigates on the merits, the judgment of the New York Court will be *res judicata* in any subsequent action. Thus, if, in the *Victor* case, the defendant appears, defends on the merits and loses the plaintiff will only be able to *recover* the limits of Hanover's policy, *i.e.*, $20,000, according to the subject memorandum-decision. But this does not mean that the *judgment* in the New York action cannot exceed the policy limits. The net result is that plaintiff will be able to sue on the New York judgment in a jurisdiction, such as Maryland, where the defendant insured is subject to personal jurisdiction and recover any amount in excess of the $20,000 policy limits recovered in New York. At the very least, the New York judgment, being on the merits with the defendant personally before the Court, will settle the liability question in any subsequent suit.

In the unlikely event that the New York judgment will not be *res judicata,* the result will be at least two separate suits on the merits where an amount in excess of the policy limits is sought. Such a multiplicity of suits may result in different decisions as to liability and definitely will impose upon both the insured and insurer and their witnesses added expense and inconvenience. In addition, the insured

has no protection in those situations where, a question of coverage existing, the insurer defends under a reservation of rights agreement or where the insurer disclaims liability for a cause, such as lack of cooperation, after defense on the merits commences.

The memorandum-decision of the New York Court of Appeals in the *Simpson* case in no way relieves the insurer or insured of the problems discussed in the Appellant's Statement as to Jurisdiction nor does it dispose of the substantial constitutional questions raised on this appeal.

Respectfully submitted,

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